IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.4512 OF 1993

The Shivaji University
through the Registrar,
Shivaji University,
Vidyanagar, Kolhapur. .... Petitioner

- Versus -

1. Anekant Education Society's
   Jaysingpur College,
   Jaysingpur, through its
   Secretary Shri Amagonda
   A. Patil, Jaysingpur,
   Tal. Shirol, District -
   Kolhapur.

2. The Principal,
   Jaysingpur College,
   Jaysingpur.

3. Shri Deepak Vishnu Chandane,
   At Kodoli, Tal. Panhala,
   District: Kolhapur.

4. The State of Maharashtra
   through the Secretary,
   Education and Employment
   Service Department,
   Mantralaya, Bombay. .... Respondents

Shri R.G. Ketkar for the Petitioner.

None present for the Respondent Nos.1 and 2,
though served.

Sarvasri S.M. Dange i/b L.T. Satelkar for
the Respondent No.3.

Ms V.S. Mhaispurkar, Asst. Government
Pleader, for the Respondent No.4.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: FEBRUARY 21, 2007

JUDGMENT:

1. Heard. The petitioner challenges the orders dated 3-1-1992, 23-9-1992 and 29-7-1993 passed by the College Tribunal, Pune. By order dated 3-1-1992 the College Tribunal had allowed the Appeal filed by the respondent No.3 herein against the respondent No.1. By order dated 23-9-1992 the College Tribunal had sought to clarify that the order of 3-1-1992 was binding on the parties to the Appeal and the appellant therein who was joined as the respondent No.2 to the said Appeal should regularise the appointment of the respondent No.3 herein. By the order dated 29-7-1993 the College Tribunal had dismissed the application filed by the petitioner for review of the order dated 23-9-1992.

2. The respondent No.3 herein was a lecturer in History in Jaysingpur College of the respondent No.1, appointed during the academic year 1987-88 on clock hourly basis. The said appointment was approved by the petitioner under the letter dated 31-10-1987. For the academic year 1988-89 a full-time post of lecturer in History was approved which was required to be filled in by appointing a reserved category candidate. Since no

suitable candidate from the backward category in the concerned subject was available, the 3rd respondent came to be appointed in the said post for the academic year 1988-89. Similarly for the academic year 1989-90 as no candidate from the backward class category was available, the respondent No.3 came to be appointed in the same post, which was also approved by the University for the academic year 1989-90. Even for the academic year 1990-91, the respondent No.3 continued to occupy the said post. Meanwhile, the management proposed to de-reserve the said post and applied for approval of the appointment of the respondent No.3 in the said post. The said proposal was turned down by the University and the management was directed to issue fresh advertisement and to call for fresh applications. The management complied with the said direction, however, no Scheduled Caste category candidate could be selected as no such candidate was found suitable for the post. However, the services of the 3rd respondent came to be terminated by the respondent No.1 by the order dated 8-9-1991 on account of absence of approval for his appointment by the University. The said order of 8-9-1991 was sought to be challenged by the respondent No.3 by filing appeal against the respondent No.1 alone before the College Tribunal and by order dated 3-1-1992, in the said Appeal, the same was allowed by giving the benefit of the Government Circular dated 30-9-1989. Based on the

said Judgment, the respondent No.1 submitted proposal for approval of appointment of the respondent No.3 which came to be rejected by the University. Thereupon, the respondent Nos.1 and 2 herein filed Appeal against the respondent No.3 and the petitioner herein which came to be allowed by the order dated 23-9-1992. It was held that the order dated 3-1-1992 in Appeal No.40 of 1991 is binding upon the parties and therefore petitioner was directed to regularise the appointment of the respondent No.3. An attempt on the part of the petitioner to get the said order reviewed did not yield favourable result. Hence the present petition.

3. Upon hearing the learned Advocates for the parties and perusal of the records, the following questions arise for consideration:

(i) Whether the College Tribunal constituted under the Shivaji University Act, 1974, hereinafter called as "the said Act" has powers to review its own order?

(ii) Whether in the absence of the petitioner being a party to the Appeal No.13 of 1992, the Judgment and Order passed therein is binding upon the petitioner?

(iii) Whether, in the facts and circumstances of the case the petitioner was justified in ordering termination of the services of the respondent No.3 on account of alleged non-clearance of the backlog in relation to the reserved category candidates by the respondent No.1, and whether it was justified in refusing de-reservation of the post as was requested by the respondent No.1?

(iv) Whether the Circular dated 30-9-1989, issued by the Government of Maharashtra, is applicable to the facts and circumstances of the case in hand?

4. The said Act nowhere provides for power of review to the College Tribunal. It is settled law that when the Courts or Tribunals are created under a statute, such a Court or Tribunal cannot travel beyond the scope of the powers prescribed under the statute under which it is created or established. The contention on behalf of the petitioner, however, is that Section 42C impliedly provide for such powers to the College Tribunal.

5. The Section 42C(1) of the said Act provides that for the purpose of admission, hearing and disposal of appeals, the Tribunal shall have the same powers as are vested in an Appellate Court under the Code of Civil

Procedure, 1908, and shall also have the power to stay the operation of any order against which an appeal is made, on such conditions as it may think fit to impose and such other powers as are conferred on it by or under the said Act. The sub-section (2) thereof provides that the Presiding Officer of the Tribunal shall decide the procedure to be followed by the Tribunal for the disposal of its business including the place or places at which and the hours during which it shall hold its sittings. Referring to these provisions, it is sought to be contended on behalf of the petitioner that the provisions of the C.P.C., particularly Order 47, would apply to the proceedings in appeal under the said Act.

6. There is no doubt that in terms of Section 42C the College Tribunal is vested with the powers of the Appellate Court which are available under the Code of Civil Procedure. However, such powers are specifically stated to be in relation to admission, hearing and disposal of appeals. The provisions under Section 42C(1), which empower the College Tribunal to exercise the powers of the Appellate Court under the C.P.C. for the purpose of admission, hearing and disposal of appeal, nowhere provides that even after the disposal of the appeal, the College Tribunal would continue to have powers to re-open the appeal or to review the order passed disposing the appeal. On the contrary, Section

42E of the said Act clearly provides that the decision of the Tribunal on appeal on disposal thereof attains finality. In other words, the College Tribunal becomes functus officio on disposal of the appeal in relation to the matter decided by it. The Section 42C(1) nowhere provides for extending the provisions of Order 47 and for that matter Section 151 of the C.P.C. to the proceedings in an appeal before the College Tribunal. It is settled law that the power of review is not inherent in a Court and Tribunal created and established under a statute and such power cannot be exercised by such Court and Tribunal unless the statute under which it is established specifically empowers the Court or Tribunal to exercise such power. Undisputedly, the said Act nowhere provides for such powers. As regards Section 42C, it restricts the applicability of the provisions of C.P.C. in relation to the matters specified thereunder, and the same do not include review powers. Being so, the contention of the petitioner about the availability of review powers to the College Tribunal cannot be accepted and is to be rejected as being devoid of substance.

7. As regards the second point for consideration, it is not in dispute that the petitioner was not a party to the Appeal No.40 of 1991, which was filed by the respondent No.3 against the respondent No.1, challenging

the order of termination of his services dated 8-9-1991. It is also undisputed fact that the order dated 8-9-1991 was issued in terms of the direction in that regard by the petitioner and on account of refusal by the petitioner to approve the appointment of the respondent No.3, in exercise of powers of the University under the said Act r/w the statutes and the rules and regulations framed by the University. Once it is not in dispute that the action which was sought to be challenged in the Appeal No.40 of 1991 was on account of refusal of approval for his appointment by the petitioner and further the termination was in terms of the direction issued by the petitioner in exercise of its statutory duties and the petitioner was not made a party to such challenge, any decision arrived therein cannot be said to be binding upon the petitioner. If the authority whose decision is sought to be challenged in the appeal under the said Act is not made party the proceedings, then the decision arrived by the Appellate Authority can neither be said to be final, nor it can bind such authority. A statutory authority which is empowered under a statute to take decision in a matter, cannot be asked to change the decision without being offered an opportunity of being heard in the matter. Any adjudication in the appeal, in the absence of such authority, would be incomplete. It is, however, sought to be contended on behalf of the respondents that though

the petitioner was a proper party to the appeal, it was not a necessary party.

8. Undoubtedly, there is distinction between necessary party and proper party to a proceeding. The necessary party is one party whose presence is essential and in whose absence there cannot be proper and conclusive adjudication of a matter in dispute and no effective and executable order can be passed. The proper party is one whose presence is a matter of convenience to enable the Court to adjudicate more effectively and completely. The Section 99 of the C.P.C. provides that no decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of mis-joinder or non-joinder of parties or cause of action or any error, defect or irregularity in any proceedings in a suit, not affecting the merits of the case or the jurisdiction of the Court, provided that nothing in the said Section shall apply to non-joinder of a necessary party. In other words, if any issue is sought to be adjudicated upon in the absence of a necessary party, then the order passed in such adjudication proceedings would not be an effective and executable order nor would be binding on the necessary party in whose absence the order is passed.

9. In the case in hand, as already observed above, it

is not in dispute that the appointment of the respondent No.3 did require the approval of the petitioner and in the absence thereof he could not have continued in the service of the respondent No.1. The order of termination of services of the respondent No.3 was passed on 8-9-1991 in terms of the direction issued by the petitioners. Evidently, therefore, the respondent No.3 had, in fact, sought to challenge the decision of the petitioner, communicated through the respondent No.1. Obviously, therefore, the presence of the petitioner in the appeal before the College Tribunal for adjudication of the subject-matter of the Appeal No.40 of 1991 was absolutely necessary. The petitioner was not a mere proper party to the said proceedings, as sought to be contended by the respondent No.3. The order having been passed in the absence of the petitioner as the party to such proceeding and without giving it any opportunity of placing on record its say in the matter, the order cannot be binding upon the petitioner. In fact, having realised the lapse on the part of the Appellate Court, but too late, and after disposal of the appeal, the Tribunal itself sought to clarify its order after joining the petitioner as the party to the clarification-proceedings. However, those proceedings are ab initio bad, as the Court had already become functus officio in relation to the subject-matter decided in the appeal and it lacked the power to review

its earlier order. The point No.2, therefore, has to be answered in negative.

10. That takes to the third point for consideration. Though the order of termination dated 8-9-1991 has not been placed on record, the defence which was raised by the respondent No.1 in Appeal No.40 of 1991 filed by the respondent No.3 and revealed from the Judgment dated 3-1-1992 passed by the College Tribunal, discloses that the post which was occupied by the respondent No.3 was, in fact, required to be filled in by the reserve category candidate to clear the backlog in that regard. The records, however, nowhere disclose that the said post was earmarked for the reserved category candidate in terms of the roster. To ascertain whether the post is meant for reserved category candidate or not, the roster is the best evidence. Undoubtedly, it can be established by other cogent evidence also. However, in the case in hand, apart from the claim of the petitioner and the respondent No.1 in that regard, there is no material placed on record to substantiate the same. It is true that the respondent No.1 had also requested for de-reservation of the said post which was rejected by the petitioner. It is equally true that it is in the discretion of the petitioner to grant such approval for de-reservation. But at the same time, one cannot ignore the realities of life. The decision in this regard

cannot be taken on emotional grounds. In the field of education, while ensuring due implementation of the policy of reservation for the benefit of the downtrodden people, neither the students community should be made to suffer on that count nor the meritorious candidates whose talent can be worthwhile for the benefit of the younger generation should be allowed to go unexploited. A proper balance has to be struck, while deciding on the issue of de-reservation of the post on account of non-availability of suitable candidate to occupy the post meant for imparting education to the younger generation. The University, while making issue about failure to join the petitioner as the party to the appeal filed by the respondent No.3, ought to have justified its decision to refuse de-reservation of the said post which was requested for by the respondent No.1 as well as approval to the appointment of the respondent No.3. On merits, there is not a whisper against the respondent No.3 nor any justification for rejection of the proposal for de-reservation of the post. Having approached the Court in writ jurisdiction, proper explanation by the petitioner in this regard was certainly desirable. It does not befit the public institution to challenge a decision of the Tribunal merely on account of failure on the part of the Tribunal to join it as the party to the proceedings unless it makes out a justifiable case in support of its decision,

which was sought to be interfered with by the Tribunal.

11. Though in normal course the decision for refusal of permission to de-reserve the post which was otherwise required to be filled in by a reserved category candidate, one cannot find fault with, however, once it was clear that in terms of requirement of the provisions of law, the respondent No.1 had tried on three consecutive years to get a suitable candidate from the reserved category for the said post and all the efforts of the respondent No.1 in that regard had proved futile and that therefore it had requested for de-reservation of the post, and that too, in the circumstances where suitable meritorious candidate in the form of respondent No.3 was available and had been rendering services with due approval of the petitioner, one fails to understand the logic behind the refusal of permission for de-reservation of the post. It was neither in the interest of the students community nor it can be said to be a reasonable and justifiable decision in the facts and circumstances of the case. Besides, it has been established in the course of hearing of the matter that the respondent No.3 has by now acquired doctorate in the subject. Though that cannot be a sole criteria to decide the matter, the said fact cannot be totally ignored in the facts and circumstances of the case.

12. Though the decision of the Tribunal in the appeal in the absence of the petitioner cannot be approved, at the same time, in the absence of satisfactory justification for the order and the direction issued by the petitioner consequent to which the order of termination of services of the respondent No.3 was issued and which was challenged before and set aside the Tribunal in the said appeal, interference in the said decision in writ jurisdiction on the said ground would result in restoring an unequitable and unjustifiable order and it would virtually result in defeating the justice which is otherwise sought to be attained by the decision of the Tribunal. It has been held by the Apex Court in **Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others,** reported in (1999) 8 SCC 16 that where setting aside of an order on the ground of lack of jurisdiction would result in the revival of an illegal order, refusal to interfere in the matter would be justified. Same rule will apply in the facts of the case in hand. The third point for consideration is to be answered in negative.

13. Considering the view that I am taking in the matter, it is not necessary to deal with the issue of applicability of the circular dated 30-9-1989 to the case in hand.

14. In the circumstances, though the petitioner was not a party to the proceedings before the Tribunal, in the facts and circumstances of the case stated above, and in view of the answer to the point No.(iii) as stated above, I do not find any justification for interference in the impugned judgment. In fact, interference therein would result in restoring not only inequitable and unjustifiable order, but it would result in injustice and irreparable loss to the respondent No.3. In the result, therefore, the petition is dismissed. The rule is discharged with no order as to costs.

(R.M.S. Khandeparkar, J.)

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